No. 14,708

IN THE

United States Court of Appeals

For the Ninth Circuit

ALLSTATE INSURANCE COMPANY,
a corporation,
Appellant,

vs.

OSCAR F. ERICKSON,
Appellee.

APPELLEE'S OPENING BRIEF.

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I.

THE ISSUES OF THIS CASE ARE QUESTIONS OF FACT FOR THE TRIAL COURT WHICH HAS ALREADY TWICE RESOLVED THEM IN FAVOR OF PLAINTIFF.

Not only did the trial Court determine the issues after trial upon the evidence and the Court's own observation of the witnesses, as well as upon oral and written argument of opposing Counsel (Opinion Tr. p. 15); but a second time, upon application of the appellant by notice of motion for an order to reopen the cause for further authorities and evidence, together with points and authorities in support thereof, and upon argument and hearing of that motion. (Tr. p. 35.)

It is the law of the State of California that the defense of breach of warranty is a question of fact, the burden of proof being upon the defendant.

If the trial Court finds that even though some evidence in support of this defense has been adduced by the insurer, yet the evidence is conflicting, a verdict in favor of the plaintiff, by reason of defendant's failure to sustain the burden of proof required of the insurer will not be disturbed by the Appellate Court.

> *Bennett v. Northwestern National Ins. Co.,* 84 Cal. App. 130.

Code of Civil Procedure of State of California reads as follows:

> "1847. Presumption of Truthfulness; Rebuttal; Credibility. Witness presumed to speak the truth. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility. (Enacted 1872.)"

The principle enunciated by this Code section has been repeatedly affirmed and asserted by California Appellate Courts, which have refused to disturb the decisions and findings of the trial Court as to credibility of witnesses, weight of evidence, or the truth

or falsity of allegations in issue as found by the trial Court. Some cases where the principles of this statute have been reenunciated are:

Singh v. Kashian (1954), 268 P. 2d 768, 124 C.A. 2d Supp. 879;

Hanna v. O'Connor (1951), 236 P. 2d 181, 106 C.A. 2d 760;

El Rio Oils, Canada, Limited v. Pacific Coast Asphalt Co. (1950), 213 P. 2d 1, 95 C.A. 2d 186, certiorari denied 71 S. Ct. 77, 340 U.S. 850, 95 L. Ed. 623;

People v. Woods (1946), 170 P. 2d 477, 75 C.A. 2d 246;

Taylor v. Industrial Accident Commission (1940), 100 P. 2d 511, 38 C.A. 2d 75.

Section 1981 of the Code of Civil Procedure of the State of California reads as follows:

"1981. Burden of Proof. Evidence to be produced by whom. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side. (Enacted 1872.)"

There are many cases under this section of law, but a group in point are the following:

Bennett v. Northwestern Nat. Ins. Co., Supra;

Ocean Accident & Guaranty Corp. v. Rubin (CCA 1934), 73 F. 2d 157, 96 A.L.R. 412;

Weir v. New York Life Ins. Co. (1934), 36 P. 2d 847, 1 C.A. 2d 516;

Prince v. Kennedy (1906), 85 P. 859, 3 C.A. 404;

Finn v. Vallejo Street Wharf Co. (1857), 7 C. 253.

The principle enunciated by all of the above cases, that the question whether or not there has been a breach of warranty on the part of the assured sufficient to void the policy of insurance from the inception, and the good or bad faith of the assured in making the representations claimed to have been false, are all matters of fact for the trial Court to determine, runs through virtually all of the cases cited by the defendant in its opening brief.

Based upon this basic principle, it is very difficult to quarrel with these cases. On pages 14 and 29 of the defendant's opening brief, is cited the case of *Emery v. Pacific Employers Ins. Co.,* 8 Cal. 2d 663. This case is excellent authority for the proposition that the burden of proving a breach of warranty is upon the defendant insurance company asserting the same, and is a question of fact for the trial Court. In that case there actually were three prior cancellations of insurance policies, effective dates occurring prior to the date the applicant for the insurance secured the same from the defendant insurance company, plaintiff in his application for insurance denying any prior cancellation. Nevertheless, the trial Court on various technical grounds prevented the defendant from introducing evidence of these prior cancellations, and then, based upon such exclusion of evi-

dence, the trial Court directed a verdict for the plaintiff. All that the Appellate Court did in that case was to return the case to the trial Court so that the matter of introduction of such evidence of prior cancellations might be introduced by the insurance company defendant upon a new trial.

Analysis of innumerable cases decided on the general subject of the trial of the issue of forfeiture of an insurance policy by reason of breach of warranty at the inception, leads to the inescapable conclusion that it is always a question of fact for the trier of fact.

Penn Mutual Life Ins. Co. v. Mechanics Savings Bank and Trust Co., 72 Fed. 413 at page 441, 73 Fed. 653;

Gates v. Madison Co. Ins. Co., 5 N.Y. 469 on page 474;

Olson v. Standard Marine Ins. Co., 109 C.A. 2d 130, 240 P. 2d 379 on pages 137 and 138, citing many cases.

II.

THERE IS NO QUESTION OF LAW PRESENTED TO THE APPELLATE COURT REQUIRING A REVERSAL OF THE TRIAL COURT.

The only question that seems to be presented now to this Court would be, assuming that the case of *Allstate Insurance Company v. Moldenhauer,* 193 Fed.

2d 663, relied on so heavily by appellant in their brief, actually is congruent in all its facts with the case at issue, is the Ninth Circuit Court of Appeals thereby constrained to follow that case as a principle of *stare decisis*?

The answer to that question has been made many many times in the past in many of our various Circuit Courts of Appeals, and it would be futile to cite these innumerable cases where the various Circuit Courts have not seen fit to follow decisions rendered in other Circuit Courts on the principle of *stare decisis,* but have made their own decisions, even though the facts in the case before them appear to be almost exactly the same as a case that has been decided in the other Circuit. However, the principle of *stare decisis* in this case very readily can be interpreted to uphold the position of the respondent appellee on the appeal.

In the *Moldenhauer* case, the Circuit Court of Appeals, Seventh Circuit upheld the findings of the trial Court.

The Appellate Court in the Seventh Circuit in the *Moldenhauer* case, did not make new findings, but merely upheld the decision of the trial Court. This Court is not required under any principles of law to vitiate, vacate, or abrogate the findings of the trial Court on the issues of the instant case.

Examining the law that has been submitted to this Court by appellant as supporting its application for a reversal of the trial Court, as if it were never argued before, it becomes difficult to see how in any

way the cases and authorities relied upon by appellant require any reversal of the trial Court. *The American Glove Company* case (15 Cal. App. 77) so heavily relied on by appellant as raising a legal foundation for the argument that a notice of intended cancellation effective at a future date is a cancellation effective as of the date it is issued, becomes almost ridiculous upon an examination of the facts of the *American Glove Company* case.

In that case, the American Glove Company suffered a fire loss and sued the alleged insurer, the Pennsylvania Insurance Company, claiming that they were still covered at the time of their loss under their policy of fire insurance with that company. They had received a notice of intended cancellation deposited in the mail on the 9th day of April 1906, effective as of the 14th day of April 1906. A fire occurred on the 19th day of April 1906, five days after the effective date of cancellation.

Quoting from the decision, page 79:

> "The sole question in the case is whether or not the policy was in force at the time of the loss, or had been cancelled prior to that time by the defendant."

and again on page 81:

> "The meaning of this (referring to 'will be cancelled on our books on the 14th instant, 5 days from date') was in substance that the insurance company, desiring to cancel the policy and to terminate its risk thereby, gave the insured the

> 5 days notice prescribed by the policy, *at the expiration of which the* cancellation would become effective." (Parenthetical enclosure mine.)

The Court in its discussion of the effect of the notice sent, is merely clarifying the nature of the notice, taking the obvious position that it was a clear cut notice of intention to cancel effective as of a future certain date when sent. There can hardly be any argument as to the lack of existing insurance on the date of the fire suffered by the plaintiff in that case. The case in no way is on all fours with the instant one.

Of course, all subsequent case and text authority relying upon and citing the *American Glove Company* case, cited by counsel for appellant in his brief, particularly on pages 13 and 17 thereof, can be no more persuasive of appellant's cause than their source, the *American Glove Company* case.

The general rule that the insurance company having written the policy through its experts will be deemed to be bound by its own language, and that the Court will never seek for a strict construction which will sustain a forfeiture, but rather strictly construe the language against the company, and will be liberal in its construction in favor of the assured, so that the insurance which he contracted for will be given effect, hardly bears recital, but in view of the defendant's having raised the issue, in addition to the authorities already cited by the trial Court, the fol-

lowing are some additional authorities on this general subject:

Sam Wong v. Stuyvesant Ins. Co., 100 Cal. App. 109, 29 Am. Jur., Section 164, 29 Am. Jur. 166, notes and cases, 29 Am. Jur. 167, cases;

Sampson v. Central Indemnity Co., 8 Cal. 2d 476;

Christisen v. St. Paul Fire & Marine Ins. Co., 138 Minn. 51, 163 N.W. 980;

Pfeiffer v. Missouri State Life Ins. Co., 174 Ark. 783;

Hampton v. Hartford Fire Ins. Co., 65 N.J.L. 265;

Wright v. Fraternities Health & Accident Assoc., 107 Me. 418, 78 A. 495;

American Credit Indemnity Co. v. E. R. Apt Shoe Co., 74 F.2d 345;

Union Indemnity Co. v. Dodd, 21 F.2d 709.

As an example of the strictness of construction in policies attempted to be forfeited by insurance companies imposed upon the companies by the Courts is *Rabin v. Central Businessman's Association,* 116 Kan. 280, 226 P. 764, where the Court held a warranty no other insurance has been cancelled, is not a warranty as to non-prior cancellation where there has been prior voluntary surrender and cancellation of the policy by reason of such surrender.

In the case of *Wright v. Fraternities Health and Accident,* supra, the Court held that where an assured had had an application for life insurance re-

jected by another company, and then in answer to a question in an application for Health and Accident insurance replied "No", to the question "Has any company, society or association ever rejected your application?", was not making a warranty of non-prior cancellation by giving this negative answer, since the wording of the question by its express terms did not refer to life insurance.

Applying the above rule as a rule of law, issues already having been determined as issues of fact, it cannot fairly be said that the application form and declarations in the insurance policy in the instant case prepared by the insurer itself were so clear and unambiguous on their face, the Court already having found that the statements made by the applicant were in good faith, that this Court, as an Appellate Court, should be constrained upon the face of the policy and the application form and the language therein contained, to reverse the trial Court.

Appellant attempts to fall back also upon various provisions of the Insurance Code as authority requiring this Court to reverse the trial Court as a matter of law. The sections of the Insurance Code of the State of California cited by appellant are all conditioned by other sections not cited, also contained in the same Insurance Code. Particularly pertinent are Sections 332, 333, 335, and 336 of the same Code, which read as follows respectively:

> "332. Required Disclosures. Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowl-

edge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining. (Enacted 1935.)"

"333. Matters Not Required to Be Disclosed Except Upon Inquiry. Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:

1. Those which the other knows.
2. Those which, in the exercise of ordinary care, the other ought to know, and of which the party has no reason to suppose him ignorant.
3. Those of which the other waives communication.
4. Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material.
5. Those which relate to a risk excepted from insurance, and which are not otherwise material. (Enacted 1935.)"

"Section 335. Presumed Knowledge. Each party to a contract of insurance is bound to know:

(a) All the general causes which are open to his inquiry equally with that of the other, and which may affect either the political or material perils contemplated.

(b) All the general usages of trade. (Enacted 1935.)"

"336. Waiver of Right to Information. The right to information of material facts may be

> waived, either (a) by the terms of insurance or (b) by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated. (Enacted 1935.)"

Examining once again the facts of this case for the purpose of applying some of these principles of law as expressed in the Insurance Code and cases which will be cited herein, it may be observed upon examination of defendant's Exhibit D that at the time Mr. Erickson applied for his insurance with the defendant Allstate Insurance Company, they received the name of his previous insurance company, State Farm Insurance Company, the number of his State Farm policy and inserted in the form by the defendant's agent what the agent said Erickson claimed as the expiration date of the State Farm policy, the 17th day of December, 1952, the same day the application was being made to Allstate Insurance Company. Of course, all information filled in on the back of the application form by the agent was not accurate, e.g., "nationality Swedish" when Erickson was American born but there obviously was enough information in possession of defendant if it desired to examine into the matter, which would very readily have produced the facts that they claim, when readily ascertained after the accident, relieved them of liability under their contract.

Mr. Wood, underwriter for the defendant Allstate Insurance Company, testified that a letter of inquiry,

a common practice of the company, or a phone call by the Allstate Insurance Company would have revealed all the information as to prior cancellation, if any, that his company now attempts to use as an excuse to defeat insurance (Tr. p. 148). However, the company made not the slightest inquiry at the time the application was made, but instead subsequently issued its policy of insurance containing its own printed form of declarations.

As the Court has said in its opinion (Tr. pages 17 and 18):

> "The insurer here was a national company doing business throughout the nation. It maintains a booth in various Sears stores for the purpose of selling insurance, and the policy in question was issued at such a booth. It was in a position to know of the possibility that facts such as prevail here might arise. Any printed questions or declarations that the insurance company felt were proper or desirable could have been printed in the application and policy. It chose to phrase the language used in the manner set out above. If it desired more detailed or other information, it could have asked for it. The answer of the plaintiff, taken literally, was not false. The plaintiff did not make these statements with bad faith or with any intent to deceive or falsity. When he stated that his previous insurance had not been cancelled, he was not in error. It was being cancelled some ten days later. Therefore, there was no false representation or breach of warranty by the insured, and the insurer will not be permitted to void the policy from its inception on that ground."

The company did not choose to phrase its policy application or declaration to ask the question "Has any insurer ever forwarded a notice of cancellation?" or some similar protective language, if it so desired, and chose not to make the slightest attempt to check up or inquire about the applicant's insurance status with all the information they might require readily available.

There is a great deal of authority in California and in the United States, both new and old, that will not permit the insurance company, as a matter of law, to escape liability upon such careless writing of their policy and application forms and failure to investigate or check up in the slightest degree upon facts readily available to them. Many of these cases also state that the insured is not required to give answers as to facts upon which no inquiry is made, since the insurance company may protect itself by the wording of their contract as to such information.

Olson v. Standard Marine Ins. Co., supra;

Columbian National Life Ins. Co. v. Rogers, 116 F.2d 705, certiorari denied 313 U.S. 561;

Penn Mutual Life Ins. Co. v. Mechanics Bank and Trust Co., supra;

Gates v. Madison Co. Ins. Co., supra;

Protection Ins. Co. v. Hamer, 2 Ohio State 452 on page 473;

Clark v. Manufacturers Ins. Co., 8 How. 235;

Federal Land Bank of St. Paul v. Edwards, 262 Michigan 180, 247 N.W. 147 on page 149.

In *Newman v. Firemen's Ins. of Newark,* 67 CA.2d 386, 145 P.2d 451, interpreting sections 332, 333, and 335 of the Insurance Code of California, the Court held that an insurance company is bound by knowledge readily available to it, of the previous bad record and insurance status of an assured, even though he conceals this information on a new application to the carrier.

In *E. F. Boyd Co. v. U. S. F & G Co.,* 35 CA.2d 171, where the carrier wrote a surety bond to cover an employee where employer did not reveal the fact that employee was a convicted embezzler, insurance company was held bound to ascertain this fact from records available to them.

CONCLUSION.

The trial Court in its opinion has cogently and succinctly given its reasons for rendering judgment in favor of the plaintiff appellee, Oscar F. Erickson. The trial Court's findings of fact, conclusions of law, and its written opinion make it clear that plaintiff should recover against the defendant insurance company, if the case be considered both from the view point of factual and legal issues. This brief has merely attempted to gather more extensive authority on the well reasoned principles applied by the trial Court to the determination of this case. The trial Court, as pointed out in Point I of this brief, heard the evidence, saw the witnesses, weighed the matter carefully on at least two occasions, both as to facts and

as to law, and made its decision in favor of the plaintiff. The defendant has presented nothing in its brief which would require this Court to supplant the decision of the trial Court, either on the facts or on the law.

Wherefore, the undersigned respectfully prays that this Court dismiss appellant's appeal, returning the case to the trial Court in status quo, leaving the verdict of the trial Court outstanding as against this defendant.

Dated: San Francisco, California,
July 27, 1955.

Respectfully submitted,

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